

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

In re: Michael Barrett,

Debtor.

Case No. 03-71068-PJS

Chapter 13

Hon. Phillip J. Shefferly

**OPINION GRANTING THE DEBTOR'S MOTION TO MODIFY CONFIRMED  
CHAPTER 13 PLAN AND EXCUSE PAYMENTS AND DENYING CHRISTINE  
BARRETT'S MOTION TO DISMISS CHAPTER 13 CASE**

**I.**

This is a confirmed chapter 13 case. The Creditor, Christine Barrett, is the ex-spouse of the Debtor, Michael Barrett. The Creditor holds a pre-petition priority claim against the Debtor under 11 U.S.C. § 507(a)(7). This case was previously before the Court on the Creditor's objection to the post-confirmation fee application of the Debtor's counsel. Although the fees were substantial because of extensive litigation between the Creditor and the Debtor, the Creditor did not object on the basis of the necessity or reasonableness of the fees. Instead, she objected because the Debtor's plan provided that, if awarded, the approximately \$6,100 in fees would be paid in full ahead of all other claims, causing a lengthy interruption in the distributions that she was receiving on her allowed priority claim for spousal support. The Court ruled that the Creditor's objection did not present a legal basis to deny the fee application. The Court then awarded the fees in full without prejudice to the Creditor bringing a motion for appropriate relief on some other grounds.

The Creditor promptly filed a motion to dismiss the case. She argued that the award of attorney fees rendered the plan infeasible in that, at the scheduled payment rate, it would take

eighty-three months to complete the plan. The Creditor also alleged that the Debtor was already in material default in his plan payments, with a \$1,298 delinquency causing his pay history to be only 88%.

In response, the Debtor filed a motion to modify his confirmed chapter 13 plan and excuse the missed payments. The Debtor explained that his default in plan payments was caused by periodic short term layoffs from his work in the trucking industry. He attributed the increase in the plan length and any resulting infeasibility, not only to the allowance of the attorney fees, but also to the allowance in full of the Creditor's priority claim, which occurred after the plan was confirmed. The Debtor proposed to modify his plan to increase his weekly payments from \$144.23 to \$300 and excuse \$1,442.30 in missed payments. The Debtor was able to increase his payments, he stated, due to a reduction in expenses because he now has one less dependent to support. The modified plan would still pay the Creditor's allowed \$22,000 priority claim in full over the life of the five-year term. The Creditor filed an objection, arguing that § 105 of the Bankruptcy Code gives the Court authority to require pro rata distributions among all priority creditors, and that the Debtor's attorney fee award cannot be paid ahead of the Creditor's priority claim.

The Court held a hearing on both matters on July 12, 2005 and took the matters under advisement, encouraging the parties in the meantime to reach a compromise that was acceptable to both sides. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O), over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a).

## **II.**

Because the Debtor's proposed plan modification addresses some of the Creditor's

grounds for her motion to dismiss, the Court will discuss the Debtor's motion first. The Debtor's proposed increase in plan payments remedies the infeasibility objection. The Debtor's plan now runs timely. As to the Debtor's request to excuse the missed payments, there was no question raised about the truthfulness of the Debtor's explanation that the default was the result of temporary circumstances beyond his control. Accordingly, because the Creditor's objections based on infeasibility and pay history are satisfactorily addressed by the plan modification, they do not provide a basis to dismiss this case.

The Creditor's remaining argument against the approval of the Debtor's plan modification is that this Court is a court of equity, and the Court's power under § 105(a) allows it to mandate pro rata distributions among priority creditors. The Creditor relies on this argument in her motion to dismiss as well. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The Creditor concludes that justice and fairness require that the Debtor's attorney receive payment on his claim over a longer period of time, especially as the Creditor relies on the spousal support for her day-to-day living expenses. The Court fully understands and appreciates the impact that the unexpectedly large post-confirmation attorney fee award has on distributions to other creditors under the plan and sympathizes with the predicament in which this places the Creditor. However, § 105(a) does not give the Court unlimited authority to fashion a remedy any time it is faced with alleged inequitable circumstances.

Although § 105(a) permits a bankruptcy court to use its equity powers . . . , "[t]he equitable powers of section 105(a) may only be used in furtherance of the goals of the Code." As the Supreme Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."

Mill v. Pennsylvania Higher Education Assistance Agency (In re Miller), 377 F.3d 616, 621 (6th Cir. 2004) (quoting Childress v. Middleton Arms, L.P. (In re Middleton Arms, Ltd. Partnership), 934 F.2d 723, 725 (6th Cir.1991) and Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)). Despite the broad language of § 105(a), “[t]he bankruptcy court’s [ ] equitable powers are nonetheless constrained to actions or determinations that are ‘not inconsistent’ with the Bankruptcy Code.” ATD Corp. v. Advantage Packaging, Inc. (In re ATD Corp.), 352 F.3d 1062, 1066 (6th Cir. 2003) (citing United States v. Energy Research Co., 495 U.S. 545, 549-50, (1990)) (other citations omitted).

The Creditor argues that delaying payment of the attorney fee award for some period of time to allow concurrent payment of her priority claim is consistent with § 1326(b)(1) of the Bankruptcy Code. The Debtor disagrees. Section 1326(b)(1) of the Code provides that, “[b]efore or at the time of each payment to creditors under the plan, there shall be paid [ ] any unpaid claim of the kind specified in section 507(a)(1) of this title . . . .” Section 507(a)(1) in turn gives first priority to “administrative expenses allowed under section 503(b) of this title . . . .” The fees and expenses awarded to the Debtor’s counsel under § 330(a)(1) are allowed as administrative expenses under § 503(b)(2). Therefore, before or at the time of each payment to the Creditor, there shall be paid any unpaid allowed award of fees and expenses of the Debtor’s counsel.

Although the Creditor’s claim is a priority claim under 11 U.S.C. § 507(a)(7), § 1326(b)(1) does not require that it be paid before or at the time of each payment to other creditors under the plan. Section 1326(b)(1) only extends its protection to claims of the kind specified in § 507(a)(1). There is a separate provision in § 1322(a)(2) that requires that a plan

“shall . . . provide for the full payment . . . of all claims entitled to priority under section 507 . . . .” However, it is undisputed that the Debtor’s plan, as modified, does pay the Creditor’s § 507(a)(7) priority claim in full, and therefore complies with § 1322(a)(2).

The statutory language in § 1326(b)(1) and the conflicting interpretations of it were thoroughly and carefully analyzed by the court in In re Harris, 304 B.R. 751, 756-58 (Bankr. E.D. Mich. 2004) (J. Tucker). Although discussed in the context of a request for concurrent payments to a secured creditor, rather than an unsecured priority creditor, the analysis of § 1326(b)(1) is equally applicable to a request for concurrent payments to an unsecured priority creditor. This Court agrees with the Harris court’s conclusion that “§ 1326(b)(1) does not require or allow the full payment of Debtors’ attorney fees to be delayed in favor of payments to a secured creditor, unless Debtor’s [sic] counsel has agreed to such delay.” Id. at 758. It is not uncommon for a debtor’s counsel to agree to delay payment of his or her attorney fees so as to enable payments to be made to other creditors where, absent such payments, the treatment of the claims of such creditors might not otherwise comply with applicable provisions of § 1322 or § 1325. But the Creditor here does not contend that the Debtor’s plan somehow fails to treat the Creditor’s claim in compliance with § 1322(a)(2) or some other Code provision. Instead, the Creditor simply argues that because both the Creditor’s claim and the attorney fees are priority claims under § 507(a), they should be given equal treatment under the plan. However, by virtue of § 1326(b)(1), Congress has determined that the awarded attorney fees have a higher priority than other pre-petition priority claims and that their payment in full is required under a chapter 13 plan before or at the time that payments to other creditors can commence. The Court cannot override this legislative mandate. Furthermore, the Court’s equitable powers under § 105(a) cannot do so

either, even if the Court shares some of the Creditor's concerns about the results in this case and their effect on the Creditor.

The Creditor also argues that dismissal is warranted under § 1307(c)(1) for “unreasonable delay by the debtor that is prejudicial to creditors . . . .” The Creditor overestimated the attorney fee award at \$7,000 and calculated that the interruption in her distributions could be up to a year. Because the awarded fees are actually \$6,100, and the Debtor has proposed a substantial increase in his weekly payments, the actual interruption will be approximately five months. The question is whether this is an unreasonable delay. The Court has no basis in the record to find that the Debtor has engaged in any “unreasonable delay.” The Creditor's real argument is that the delay in payments to the Creditor is unreasonable and prejudicial. However, § 1307(c)(1) speaks in terms of unreasonable delay “by the debtor,” and says nothing about delay in payments to a creditor. There is no evidence that the Debtor is delaying, but instead it appears to the Court that the Debtor is doing everything he can to make this plan work, including devoting a third of his income to plan payments. Although the Court understands that the temporary delay in payments to the Creditor may cause a hardship to the Creditor, the Court cannot conclude that this delay provides cause for dismissal under § 1307(c)(1).

Accordingly, the Court GRANTS the Debtor's first motion to modify confirmed chapter 13 plan and excuse payments, and DENIES the Creditor's motion to dismiss chapter 13 case. The Court will enter two orders consistent with this opinion.

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Phillip J. Shefferly  
United States Bankruptcy Judge

Dated: August 16, 2005  
Service list on page 6.

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